

HJ. HUSSIN HJ. ALI & ORS.

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v.

DATUK HJ. MOHAMED YAACOB & ORS. & OTHER CASES

FEDERAL COURT, KOTA BHARU

WAN SULEIMAN FJ

GEORGE SEAH FJ

HASHIM YEOP SANI FJ

[CIVIL APPEAL NOS. 34, 35 & 36 OF 1983]

25 JUNE 1983

b

CIVIL PROCEDURE: *Claim against Government by Penghulus for dismissal - On ground that dismissal was unconstitutional and unlawful, breach of Kelantan State Constitution and Federal Constitution - Application by Government to strike out statement of claim - On ground that it discloses no reasonable cause of action, frivolous, vexatious, irregular, null and void, abuse of process of Court - No defence entered - Declaratory judgment - Discretion of Court.*

c

CIVIL PROCEDURE: *Government Proceedings - Limitation - Statute barred - Whether limitation has to be pleaded.*

d

The appellants in the 3 appeals had filed 3 suits at the High Court, Kota Bahru, against the 3 respondents by a total of 157 persons who claimed to be Penghulus Kampong against their dismissal by the 1st defendant/respondent on the ground that it was unconstitutional and unlawful, that there had been breach of the relevant constitutional provision of the Kelantan State Constitution as well as Article 8 of the Federal Constitution, and in their prayer they had sought:

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- (1) a declaration that the State Government unconstitutionally acted in dismissing the plaintiffs as Penghulus;
- (2) a declaration that such dismissal was contrary to Clause LX (first part) of the Constitution;
- (3) an order that the plaintiffs be reinstated as Penghulus alternatively;
- (4) an enquiry into damages in respect of annual allowances, travelling allowances, gratuity and/or pensions due to the plaintiffs. They also sought further or other reliefs.

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The three suits were filed approximately 43 months, 46 months and 45 months respectively after the letter terminating the appellants' services were sent to them.

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The defendants/respondents did not file a defence but filed an application under O. 18 r. 19 of the Rules of the High Court 1980 for the writ to be struck out on the grounds that:

- (a) it discloses no reasonable cause of action;
- (b) it is frivolous, vexatious, irregular, null and void, and
- (c) it is otherwise an abuse of the process of Court.

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By an affidavit in support of the application, the State Legal Adviser, Kelantan, Counsel for the defendants/respondents, had averred that since the acts in dismissing the plaintiffs/appellants were done in the execution of their public duties in accordance with the authority provided by the relevant regulations and since all the plaintiffs/appellants had filed their

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a respective actions too late they were statute barred by s. 2(a) of the Public Authorities Protection Act 1948. Counsel for the appellants submitted at the appeal that limitation had to be pleaded.

Held:

b [1] Where it was clear that the defendant was going to rely on the statute of limitations and there was nothing before the Court to suggest that the plaintiffs could escape from it, the claim would be struck out.

[2] In filing the three civil suits well out of time, the plaintiffs/appellants had been guilty of unreasonable delay.

c [3] The three suits were filed approximately 43 months, 46 months and 45 months respectively after the letter terminating the appellants' services were sent to them and therefore well after the three year limit prescribed by s. 2(a) of the Public Authorities Protection Act 1948.

[4] The granting of a declaratory judgment is a matter purely at the discretion of the Court. The circumstances surrounding the present appeals does not justify exercising this discretion in favor of the appellants where there had been unreasonable vacillation and delay.

d [5] Accordingly, the appeals were dismissed with costs.

[Appeals dismissed with costs.]

Cases referred to:

Tio Chee Hing & Ors. v. Government of Sabah [1981] 1 MLJ 207
Riches v. Director of Public Prosecutions [1973] 2 AER 935
Dyson v. Attorney-General [1911] 1 KB 410
e *Guaranty Trust Company of New York v. Hannay & Company* [1915] 2 KB 536
Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd. [1921] 2 AC 438

Legislation referred to:

Federal Constitution, art. 8
 Public Authorities Protection Act 1948, s. 2 (a)
 Rules of the High Court 1980, O. 18 r. 19, O. 25 r. 5
f *For the appellants - Wan Mustapha bin Haji Ali; M/s. Wan Mustapha & Co.*
For the respondents - Abdul Hamid b. Hj. Mohamed, L.A. Kelantan

JUDGMENT

Wan Suleiman FJ:

g Civil Appeals No. 34, 35 and 36 of 1983 concern 3 suits by a total of 157 persons who claimed to be Penghulus Kampong who had filed the suits against the 3 respondents who were the Menteri Besar, the State Secretary and the Government of the State of Kelantan, respectively.

h The plaintiffs in the 3 suits alleged that their dismissal by the first defendant/respondent had been unconstitutional and unlawful, that there had been breach of the relevant constitutional provision of the Kelantan State Constitution as well as Article 8 of the Federal Constitution, and in their prayer they sought:

- (1) a declaration that the State Government unconstitutionally acted in dismissing the plaintiffs as Penghulus;
 - (2) a declaration that such dismissal was contrary to Clause LX (first part) of the Constitution;
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(3) an order that the plaintiffs be reinstated as Penghulus alternatively **a**

(4) an enquiry into damages in respect of annual allowances, travelling allowances, gratuity and/or pensions due to the plaintiffs. They also sought further or other reliefs.

The defendants/respondents did not file a defence but an application was made under O. 18 r. 19 of the Rules of the High Court 1980 for the writ to be struck out on the grounds that

(a) it discloses no reasonable cause of action; **b**

(b) it is frivolous, vexatious, irregular, null and void, and

(c) it is otherwise an abuse of the process of Court.

In the affidavit in support of the summons-in-chambers the Legal Adviser, Kelantan, Counsel of the defendants/respondents, averred that since the acts in dismissing these Penghulus Kampong were done in the execution of their public duties in accordance with the authority provided by the relevant regulations and since all the plaintiffs had filed their respective actions too late they were statute barred by s. 2 (a) of the Public Authorities Protection Act 1948. **c**

Dato' Wan Mustapha for the appellants now says that limitation has to be pleaded. **d**

We need not go further than to refer to the judgment of this Court in *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207 where this Court referring to the Court of Appeal decision in *Riches v. Director of Public Prosecutions* [1973] 2 AER 935 which decided that where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the Court to suggest that the plaintiffs could escape from it, the claim would be struck out. An extract from the judgment of Davies LJ at p. 939 is relevant: **e**

In the light of those more recent authorities I think, as I say, that perhaps the observations of this Court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the Statement of Claim discloses no cause of action, the limitation objection should or would prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail. **f**

That indeed was the answer of the learned Legal Adviser. We agree with him.

The only other ground taken by the appellants was that where a declaratory judgment is sought the Court may make a declaration irrespective of whether or not a consequential relief could be obtained. **g**

Learned Counsel for the appellants relied on *Dyson v. Attorney-General* [1911] 1 KB 410. In that case, certain notices, commonly known as Form 4, were issued by the Commissioners of Inland Revenue under the Finance [1909-1910] Act, 1910. The plaintiff was served with such a form, requiring him to make certain returns and deliver them to an appointed officer within thirty days, under a penalty not exceeding £50. Compliance with this requirement would have involved him in expenses and inconvenience. The plaintiff, thereupon, alleging that the notices were unauthorised and illegal, sued the Attorney-General for a declaration to this effect. This course was strenuously objected to by the defendant, who did not fail to stress the then unusual features of the case. It should be observed, in the first place, that no right of the plaintiff was, or was threatened to be, infringed, that the declaration was not asked **h**

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a for to ascertain any of his rights, but merely to establish in a negative way that he was under no obligation to comply with the notice; and that he had no cause of action in the conventional sense. The Court of Appeal, however, unanimously rejected all the arguments raised and made the declaration asked for.

b A few years later in *Guaranty Trust Company of New York v. Hannay & Company* [1915] 2 KB 536 some important questions as to the scope of the declaratory judgment was further expounded. Here the plaintiffs asked for a declaration that they were not bound to refund sums paid to them by the defendants in respect of forged bills of lading, and an injunction to restrain the defendants from proceeding with an action instituted in the USA for such refund.

c The first question raised was whether this claim for a declaration came within O. 25 r. 5. The plaintiffs, it is to be observed, were in a similar position to that of the plaintiff in the *Dyson Case*; they only asked for a declaration that they were under no obligation to the defendants. In other words, they had no cause of action in the traditional sense, that is, a cause of action upon which executory relief could be granted. The Court, however, surveying the decisions on this point decided by a majority that it had jurisdiction to grant a declaration in these circumstances.

d Pickford LJ said:

I think ... that the effect of the rule (i.e. O. 25 r. 5) is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declarations.

e Another point made by Bankes LJ should be noted. Though a case of action is not necessary, he said, still "It is essential ... that a person who seeks to take advantage of the rule must be claiming relief", and "The claim for a declaration is not in itself a claim for relief". Further he made it clear that the word "relief" must be given its fullest meaning. Zamir is of the view that probably all that Bankes LJ meant was that a declaration could not be claimed for the mere sake of satisfying the curiosity of the plaintiff as to his rights, but should only be claimed to relieve the plaintiff from a real difficulty, or, in other words, for some useful purpose.

f In the latter connection see also the House of Lords decision in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438.

g However, we note from the affidavits of the State Legal Adviser, Kelantan filed in support of his application in all the three actions which are now the subject of appeal that 154 out of the 157 plaintiffs/appellants had filed actions earlier in Kota Bahru Civil Suit No. 86/1978 and 94/1970 against the third respondent, the Government of the State of Kelantan.

h That respondent had *inter alia* pleaded in defence that the plaintiffs had not been appointed Penghulus within the definition of the Interpretation Act 1967 or as members of any of the public services or holders of any office of profit within the meaning of the Federal Constitution and since their appointments as Penghulus Kampong were honorary and at the pleasure of the third respondent they had no right, lien or title to such appointments.

On 28 February 1979 the appellants filed a notice discontinuing wholly their actions against the respondent.

i We are inclined to agree with the learned Legal Adviser that in filing CS. No. 137/81, CS. No. 2/82 and CS. No. 4/82 well out of time the plaintiffs/appellants had been guilty of unreasonable delay.

We note that these subsequent suits were filed approximately 43 months, 46 months and 45 months respectively after the letter terminating the appellants' services were sent to them, and therefore well after the three year limit prescribed by s. 2 (a) of the Public Authorities Protection Act 1948.

No explanation was given by learned Counsel for the appellants for this strange course of events in his affidavits in reply or at the hearing of the appeals.

Now the granting of a declaratory judgment is a matter purely at the discretion of the Court. We do not think that the circumstances surrounding the present appeals would justify our exercising this discretion in favour of the appellants where there has been in our view, unreasonable vacillation and delay. We set down hereunder a passage from p. 191 of The Declaratory Judgment by Zamir:

This discretion is employed, as discretion was originally employed in respect of all equitable remedies, primarily to do justice in the particular case before the Court. It is wide enough to allow the Court to take into account virtually all objections and defences possible in equitable proceedings. Thus, for instance in one declaratory action the Court took into consideration the motives of the plaintiff in bringing the action *Everett v. Griffiths* [1924] 1 KB 941, 960-61. In another action *Hogg v. Scott* [1947] 1 KB 759, 767 the Court held that the plaintiff had waived his right to take the proceedings and, further assumed that the claim might also be dismissed on the ground of undue delay ("laches") *Limitation Act, 1939*.

Accordingly we dismissed this appeal with costs.

Also found at [1983] 2 CLJ 68

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